HAI MAN v. PUBLIC PROSECUTOR.

[Court of Appeal (Sir Charles Murray-Aynsley, C.J. (S'pore) Wilson and Whitton, JJ.) October 24, 1952]

[K. L. — F.M. Criminal Appeal No. 80 of 1952]

Criminal procedure — Summing-up — Misdirection.

In this case the appellant was charged with possession of ammunition, an offence punishable under Regulation 4(1)(b) of the Emergency Regulations, 1951, and sentenced to death. There was enough evidence upon which the appellant could be convicted, but exception was taken to the summing up. The learned trial Judge put the matter to the assessors as follows: ". . . . . consider all evidence before you and if you come to the conclusion that the accused was in possession of these five cartridges, then your verdict should be 'guilty'. If however, you believe the story of the accused, that is that these cartridges were just thrown at him, your verdict should, of course, be 'not guilty' ".

Held that the direction was insufficient. The assessors should have been told that even if they were not convinced of the truth of the story of the appellant, nevertheless, if it left them uncertain of his guilt, he was still entitled to a verdict of "Not guilty".

CRIMINAL APPEAL.

D. G. Rawson for the appellant.

P. G. Clough (D.P.P.) for the respondent.

Cur. Adv. Vult.

The judgment of the Court of Appeal was delivered by:

Sir Charles Murray-Aynsley, C.J., (Singapore): — In this case the appellant was charged with possession of ammunition and sentenced to death. The facts were simple but somewhat peculiar. It was alleged that the appellant asked a Malay, who was at the time Ketua Kampong, to procure him some shot-gun cartridges, saying that the Communists wanted them. According to his version, this Malay then reported the matter to the Police. The rest of the story is certainly a trap. According to the defence it is a "plant". The Malay was provided with cartridges and went with appellant to a spot where it is alleged that the cartridges were handed over, in view of a party of police. According to the Malay, the appellant led him to this spot. It seems clear that this was not true, and that the Malay led the appellant to the place where the Police were waiting. The prosecution alleged that the cartridges were actually handed over. The appellant denied this. Immediately after the appellant was arrested. A statement made to the Police was produced by the prosecution but denied by the appellant.

It is clear that there was evidence upon which the appellant could be convicted, but exception was taken to the summing-up. The learned Judge put the matter to the assessors in this way: ". . . . consider all evidence before you and if you come to the conclusion that the accused was in possession of these five cartridges, then your verdict should be 'guilty'. If, however, you believe the story of the accused, that is that these cartridges were just thrown at him, your verdict should, of course, be 'not guilty' ". We think that that direction was insufficient. The assessors should have been told that even if they were not convinced of the truth of the story of the appellant, nevertheless, if it left them uncertain of his guilt, he was still entitled to a verdict of "Not guilty". In the circumstances we consider that the appeal should be allowed and the conviction quashed.

Appeal allowed.

REX v. CHEAH TEOW PENG.

[App. Crim. Juris. (Spenser Wilkinson, J.) October 1, 1951]

[Penang — Criminal Appeal No. 23 of 1951]

Criminal procedure — Amendment of charge — Duty of Magistrate — Price Control Ordinance 1946.

This was an appeal against the acquittal of the respondent upon a charge under section 9(1)(a) of the Price Control Ordinance. It was contended on appeal that it was the duty of the Magistrate before discharging the accused to consider whether the evidence showed that he committed some offence other than that with which he is charged.

Held that it is for the prosecution to decide what their real complaint against the accused is and to frame their charges or to submit amendments accordingly and it is their obligation to draw the attention of the Magistrate to the possibility of convicting for a different offence.

Semble: The duty of a Magistrate is to hold the scales evenly between the interests of the prosecution on the one hand and the interests of the accused on the other.

Case referred to:—

(1) *Public Prosecutor v. Heng You Nang* (1949) M.L.J. 285 at p. 287.

CRIMINAL APPEAL.

C. M. Sheridan (Federal Counsel) for the Crown.

Respondent in person.

Spenser Wilkinson, J.: — This was an appeal against the acquittal of the respondent upon a charge under section 9(1)(a) of the Price Control Ordinance, 1946.

The Price Control Ordinance, 1946 has been further amended by the Emergency (Price Control) (Amendment) Regulations, 1949. It would appear from the record that the charge against the accused in this case was drawn under the section of the Ordinance which is not in force instead of under the Emergency Regulation which is in force. I do not think, however, that the slight change of wording in fact prejudiced the accused in any way at his trial.

The main ground upon which the appeal is based is that the prosecution evidence disclosed a *prima facie* case against the accused under section 9(1) (b) of the Ordinance of refusing, except with the permission of the Price Controller, to sell goods in reasonable quantities in the ordinary way of business. The learned Magistrate in his additional grounds of decision stated that before discharging the accused he considered whether the accused could be convicted under section 9(1) (b) and decided that the accused could not be so convicted in the absence of information whether the accused had not obtained permission from the Price Controller.

In this view I think the learned Magistrate was right. I think that before the accused could properly be convicted under section 9(1) (b) he would have to be given an opportunity of dealing with the question of whether he had permission of the Price Controller or not — a point in regard to which, under section 105 of the Evidence Ordinance, the burden of proof would be upon him.

Had the matter been considered at the close of the case for the prosecution the accused could then have been called upon for his defence under section 9(1) (b), although he had not been charged under this paragraph, and if thereafter his evidence did not raise a reasonable doubt in the mind of the Magistrate as to his guilt he could have been convicted.

The learned Deputy Public Prosecutor argued before me that it was the duty of the Magistrate to consider whether the evidence showed that the accused committed some offence other than that with which he was charged. Whilst I think this is to some extent true, particularly in cases where the actual offence disclosed by the evidence is obvious, I think the main obligation is upon the prosecution to draw the attention of the Magistrate to the possibility of convicting for a different offence. On this point I desire to quote from the judgment in the case of *Public Prosecutor v. Heng You Nang*[1]. The relevant passage is as follows :—

"I doubt whether section 158 imposes any duty upon a Court to alter or amend the charge. I think, rather, that it is for the prosecution to apply to the Court to exercise its power under that section. Under section 173(h), Subordinate Courts have a duty to consider the charge and amend it if necessary. Nevertheless I do not think that this section makes it incumbent on the Court to search the law for offences which an accused person may have committed. It is for the prosecution to decide what their real complaint against the accused is and to frame their charges or to submit amendments accordingly. No doubt, in a clear case, a President or a Magistrate ought to alter a charge to fit the proved facts; but if the prosecution is unable to reach a conclusion as to the proper charge, which appears to have been the position in this case, it is in my view quite improper to criticise the President for failing to carry out the functions of the prosecuting officer."

It was suggested that the Magistrate's duty is to enforce law and order and to see that an offender who has clearly committed an offence is punished. Whilst I respectfully agree with the recent *dictum* of the Lord Chief Justice that it should not be supposed that "interests of justice" necessarily means the interests of the prisoner, I desire to point out that in my opinion the duty of a Magistrate is to hold the scales evenly between the interests of the prosecution on the one hand and the interests of the accused on the other.

It has frequently been laid down that where the prosecution have failed to obtain a conviction through some defect in their conduct of a case they should not be given a second opportunity by the granting of a retrial. In the present case, however, the point regarding the permission of the Price Controller does not appear to have arisen until the notice of appeal was given and in all the circumstances I thought that this was a case where, in the interests of justice, a retrial should take place. I therefore ordered that the respondent be retried by another Magistrate on a charge under section 9(1) (b) of the Price Control Ordinance, 1946, as modified by the Emergency (Price Control) (Amendment) Regulations, 1949.

Retrial ordered.

A. K. S. OTHMAN GHANY v. REX*.

[C.C.A. (Sir Charles Murray-Aynsley, C.J. (Singapore), Abbott, Ag. C.J. (F.M.) and Brown, J.) October 24, 1951]

[Singapore — Criminal Appeal No. 11 of 1951]

Criminal procedure — Court of Criminal Appeal — Functions of — Court of Criminal Appeal Ordinance, s. 6 — Questions of fact.

The general rule in criminal and civil matters is that if a jury after a correct direction makes a finding and there is evidence to support that finding, then it cannot be challenged. Whether the Judge agrees or not is strictly immaterial.

By section 6 of the Court of Criminal Appeal Ordinance the powers of the Court are strictly limited. The Court has no power to substitute its own verdict where it disagrees with the verdict of the jury.

Cases referred to :—

(1) *R. v. Perfect* 12 Cr. App. R. 273, approved.
(2) *R. v. Wallace* 23 Cr. App. R. 32.
(3) *R. v. Barnes* 28 Cr. App. R. 141.
(4) *R. v. Millichamp* 16 Cr. App. R. 83.
(5) *R. v. Hitchcock* 19 Cr. App. R. 181.
(6) *R. v. Finch* 12 Cr. App. R. 77.

* Leave to appeal to the Judicial Committee of the Privy Council has been refused. — *Ed. M.L.J.*